UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM H. MOUSER, appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, agency.	DOCKET NUMBER SL04328510256 DATE APR 30 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant was removed from his position as Claims Representative for alleged unsatisfactory performance under the critical element of his position entitled, "Develops Claims." He was specifically charged with an unacceptable documentation accuracy rate of 62%, where 70-79% would have been considered minimally acceptable performance under the agency's pertinent appraisal standards. The removal was also based on the fact that the appellant's errors were of a routine and continuing nature, despite repeated counseling and an opportunity to improve, and on the adverse impact his unacceptable performance had on management's ability to make effective use of its limited available staff, inasmuch as it required close monitoring and review by co-workers.

In the notice of proposed removal, the agency set forth twelve examples of the general types of errors it claimed the appellant had been making most frequently during the relevant period.1/ The notice made clear the fact that the examples were illustrative in nature, that the appellant had received copies of all monthly reports and daily end-of-line review sheets listing all of the errors he was alleged to have made during the period, and that he had been given the opportunity, at periodic consultations, to contest or comment upon any of them. The proposal notice also informed the appellant of his right to review all of the material relied upon to support the proposal, and that he need not limit his reply to refutation of the specific reasons for his removal set forth in the notice. The appellant did respond to the proposal notice, challenging: the agency's alleged "preconceived plans and prejudicial norms" which made his removal inevitable; its alleged improper manipulation of the numerical performance review standards; the agency's alleged improper release of private information from case files of the applicants whose claims he processed; and generally its lack of uniformity and objectivity in applying its appraisal system to him.

Following an oral hearing, the presiding official issued an initial decision in which he first noted that the agency's notice of proposed removal did not specify all of the alleged errors upon which it based its decision, and did not explain precisely how the 62% accuracy rate was calculated (*i.e.*, how many of the appellant's cases were reviewed and how many errors were discovered). He also noted that at the hearing, two of the appellant's supervisors, including the proposing official, testified that the appellant had made 26 errors in

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1/ In this case, that period was the duration of his Performance Improvement Plan (PIP) from November 18, 1983, to February 17, 1984.

the 74 cases reviewed during the PIP, resulting in an actual accuracy rate of 64.9%. He further found that because the agency representative conceded that two of the twelve cases cited in the proposal notice should not have been reviewed, the appellant's true figures were 24 errors out of 72 cases properly reviewed, for an accuracy rate of 66.7%. Therefore, he concluded, the agency demonstrated substantial evidence of the appellant's unsatisfactory performance under the critical element of "Develops Claims."

Nevertheless, he reversed the agency action on the basis of what he found to be a harmful procedural error by the agency. Specifically, he found that the proposal notice in this case lacked sufficient specificity to apprise the appellant of the allegations of unsatisfactory performance he had to refute, citing as precedent the Board's decision in *Coltrane v. Department of the Army*, 25 M.S.P.R. 397 (1984). This was so, he found, because the agency's failure to identify specifically the remaining 14 cases (beyond the twelve set forth in the proposal notice) on which the appellant allegedly made errors, or even to incorporate into that notice by reference earlier documents identifying those cases and errors, "effectively prevented the appellant from making any response." Those remaining 14 cases, he found, were neither identified in the proposal notice nor supported by documentary evidence.

After having next determined that, contrary to the appellant's assertions, the agency had not committed age or handicap discrimination against the appellant, the presiding

official reversed the removal action and ordered the appellant's restoration.2/

In its petition for review, to which the appellant has not responded, the agency challenges the presiding official's finding of harmful procedural error, arguing initially that the appellant had never raised the specific procedural error upon which the presiding official decided the case, and that the presiding official should not have raised it *sua sponte* in this instance. The agency acknowledges that it is appropriate for a presiding official to address, on his own motion, an error that affects an employee's basic procedural rights, if it would be necessary to do so to prevent manifest injustice, see *Chance v. Department of Transportation*, 16 M.S.P.R. 583, 588-589 (1983); *Knob v. National Aeronautics and Space Administration*, 13 M.S.P.R. 509, 514 n.1 (1982), but argues that the presiding official failed to explain what manifest injustice would have ensued here had he not raised this issue.

2/ In view of this holding, the presiding official did not address the appellant's numerous allegations of procedural and other errors, namely:

> (1) that the appellant was provided no opportunity to improve his performance; (2) that he did not receive necessary training; (3) that he was improperly placed and left "on 100% review" for approximately a four-year period; (4) that the agency never communicated to the appellant how his errors were being calculated, either verbally or in writing; (5) that the agency improperly failed to cite any authority supporting its contention that the appellant had actually committed documentation errors; (6) that the agency took reprisal action against the appellant because of his union affiliation; (7) that the present action involved reprisal against the appellant for causing problems to a prior manager; and (8) that the agency utilized a local variation of the national performance standards which was not approved by either the agency or the Office of Personnel Management. In a footnote, and without any analysis, the presiding official found those allegations "substantially without merit and/or unnecessary to a resolution of the instant case."

In fact, the presiding official clearly set forth his belief that the agency's alleged procedural error violated the appellant's basic right to be allowed to make an informed response to specific charges against him. Thus, while we may, and herein do, consider the propriety of the presiding official's finding of harmful procedural error, we do not believe he erred in raising and considering the possibility of its existence in this case.

The agency then contends that the presiding official ignored the significant evidence of record that clearly contradicts any finding of such error, and based his finding in part upon the absence of evidence that he directly prevented the agency from introducing into the record. That evidence, it says, would have effectively estopped him from reaching his conclusion of harmful error. The agency's petition for review is hereby GRANTED. 5 U.S.C. § 7701(e)(1).

At the hearing, the agency attempted to elicit testimony and introduce evidence regarding all the alleged errors on which it relied in taking the action against the appellant. However, even though the presiding official acknowledged that the proposal notice indicated that the twelve examples set forth therein were only for illustrative purposes, and were not intended to be an all-inclusive list of the appellant's alleged errors, he nevertheless strictly limited the agency's presentation of evidence to those twelve examples. He did so despite the agency representative's protest that the introduction of evidence on other alleged errors would be necessary to establish the basis for the unsatisfactory accuracy rate alleged in the proposal. Hearing Transcript at 26-31.

We agree with the agency's contention that this limitation prejudiced its opportunity to prove its case.3/ However, for the following reasons, we find that despite that improper limitation, there is sufficient evidence of record to show that the agency did not commit harmful procedural error due to insufficient specificity of its proposal notice. As noted above, the proposal notice informed the appellant that he had received copies of all daily and monthly review sheets and reports, by which he had been apprised of the specific details of all the errors he was alleged to have made, and that he could review all material relied upon by the agency to document those errors and support its removal proposal. Further, the agency's memoranda to the appellant, documenting the number and type of his alleged errors for each month of the performance improvement period, provided the appellant with notice of all of the cases in question, not merely the twelve examples set forth in the proposal notice. Agency File, Tabs 10, 13, 14, and 15. Therefore, we do not believe the presiding official's reference to the *Coltrane* case is apposite. In that case, unlike this case, the Board found that the proposal notice and the performance appraisal

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3/ We do so cognizant of the fact that the presiding official, having said he would not consider any of the alleged errors over and above the twelve examples in the proposal, nevertheless factored those additional alleged errors into his computation of the appellant's actual accuracy rate and, on that basis, found that the agency had demonstrated substantial evidence of the appellant's unsatisfactory performance of the pertinent critical elements. He did so, he said, "without specifically addressing whether any of the alleged 'documentation errors' had merit." Initial Decision at 4. In a footnote to that statement he explained that he "generally [found] that a reasonable person could believe [the agency's] explanations as to all ten errors . . . ." (Emphasis added.) Thus, the initial decision itself evinces some confusion as to whether the presiding official did or did not consider more than just the twelve errors alleged in the proposal. In any case, however, we believe the presiding official's limitation of the agency's presentation of evidence clearly hindered its opportunity to prove that its proposal notice was sufficiently specific and thus free of harmful procedural error.

incorporated therein did not cite any specific incidents of unacceptable performance and did not provide any information as to how, when and where the employee's job performance was deficient. There we found the proposal and charges to be "completely lacking in specificity of fact." *Coltrane*, 25 M.S.P.R. at 402. Such is evidently not the case herein.

As also noted above, the appellant's responses to the proposal notice did not claim or betray any confusion on his part regarding the nature and extent of the charges or his inability to respond to them, nor did he attempt to demonstrate such at any time during his appeal. We therefore find no evidentiary basis of harm to the appellant in this regard, even assuming, *arguendo*, procedural error by the agency. The appellant was informed of the reasons for his proposed removal with "sufficient particularity to apprise him of the allegation he was obliged to refute." *See Burkett v. United States*, 402 F.2d 1002, 1004 (Ct. Cl. 1968).

In light of the foregoing, we find that the agency did not commit harmful procedural error. Therefore, we hereby REVERSE the presiding official's finding of such error, VACATE the remainder of the initial decision, and REMAND this case to the presiding official for further adjudication on its merits consistent with this Opinion and Order.4/

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

4/ While on the basis of the record as currently developed, we can discern no reason to upset the presiding official's determinations on the issues of alleged age and handicap discrimination, the parties shall be afforded the opportunity to readdress the allegations insofar as the production of additional evidence and testimony may warrant.